

NPL-4203-13-L2-R
E.1
4/14/99
164343

CADWALADER

Cadwalader, Wickersham & Taft

1333 New Hampshire Ave., N.W.
Washington, DC 20036
Tel: 202 862-2200
Fax: 202 862-2400

New York
Washington
Los Angeles
Charlotte
London

April 7, 1999

IC
4/14/99

BY FIRST CLASS CERTIFIED MAIL

Docket Coordinator
Headquarters
U.S. Environmental Protection Agency
CERCLA Docket Office (Mail Code 5201G)
401 M Street, S.W.
Washington, D.C. 20460

Re: Supplemental Comments on the Proposed
Listing of Sauget Area 1, in Sauget and Cahokia,
Illinois, on the CERCLA National Priorities List

Dear Docket Coordinator:

These supplemental comments are submitted by Monsanto Company ("Monsanto") and Solutia Inc. ("Solutia"), Monsanto's attorney-in-fact, in response to the proposal by the United States Environmental Protection Agency ("EPA") to list the "Sauget Area 1" sites on the National Priorities List ("NPL"), *see* 61 Fed. Reg. 30,575 (June 17, 1996), and, in particular, to the additional documents forwarded to us under cover of a letter dated March 8, 1999 from Mr. David Evans, Director, State, Tribal & Site Identification Center, Office of Solid Waste and Emergency Response, EPA.

In the September 16, 1996 comments submitted by Monsanto on the proposed listing of Sauget Area 1 on the NPL ("Monsanto Comments"), which comments Monsanto and Solutia hereby incorporate by reference as if fully set forth herein, we noted various serious data quality deficiencies in the data believed by EPA to support the NPL listing. EPA has now placed additional documents in the administrative record. The documents consist primarily of raw data, with no explanation of their significance.

As a threshold matter, it is arbitrary and capricious and an abuse of discretion for EPA to provide raw data without any explanation of EPA's views of the significance or import of the data, and to request comments on such raw unexplained data. Absent any explanation from EPA, it is not possible to understand EPA's reasoning for or understanding of the data, making it impossible for any other party to provide reasoned comments in response. The public is left to guess what EPA might think the data mean, and EPA is left free to interpret the data after reviewing the public comments. This is truly a situation in which EPA, in the words of the United States Court of Appeals for the District of Columbia Circuit, has unacceptably "cross[ed] the line from

the tolerably terse to the intolerably mute.” *Tex Tin Corp. v. EPA*, 935 F.2d 1321 (D.C. Cir. 1991) (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971)). EPA’s failure to articulate the reason for and significance of its actions at such a time that the public has an opportunity to comment on these matters deprives the public of the right to comment to which it is entitled under the Administrative Procedures Act.

It is notable that the sole non-data document included in the new EPA package concedes the correctness of the Monsanto Comments. This sole non-data document is a December 16, 1997 memorandum from EPA’s contractor Andrew M. Platt to Jeanne Griffin, EPA Region 5 (“EPA Review Memorandum”). The EPA Review Memorandum divided the issues raised by the Menzie-Cura & Associates, Inc. Data Usability Review (“Data Usability Review”) included in the previous Monsanto Comments into three parts or tiers. The EPA Review Memorandum defines the first tier of issues as the “lack of supporting data concerning ‘X’-samples.” With regard to these issues, the EPA Review Memorandum states that the contractor cannot even evaluate the validity of the comments because “certain missing documentation and preliminary data must be provided.”

For example, in the Monsanto comments, Monsanto had noted that the EPA data must be disregarded because of the absence of proper quality assurance/quality control (“QA/QC”) data. The EPA Review Memorandum concedes, at 4, that the required “Traffic Report”/Chain of Custody documentation” were missing. The memorandum admits that:

[w]ithout this documentation, there is no way to associate the sampling location, the sample number, and verification of the laboratory receipt. In addition, for water samples, there is no other documentation that indicates if the inorganic samples were analyzed for total or dissolved metals.

EPA Review Memorandum at 4 (bolding in original). The memorandum further states:

The statements that appear on all Inorganic CLP cover sheets affirming that the raw data were subjected to background correction, and that these corrections were applied before generation of analytical Results *were not addressed, and the form was not signed*. It is an extremely unusual event to receive an inorganic data package with these questions unanswered (this is the first in thousands of such Cover Sheets that this reviewer

and his associates have seen without an appropriate response.

Id. (emphasis in original).

Monsanto's previous comments noted the glaring absence of "any of the supporting laboratory data needed for QA/QC validation." Comments at 14. The EPA Review Memorandum agrees, noting the absence of required Data Reporting Forms, and the lack of raw data. The Memorandum acknowledges that "Raw Data **are of fundamental importance.**" *Id.* (bolding in original). The Memorandum further concedes that, with regard to certain items relied upon by EPA, "without the raw data, these are unverifiable and are not scientifically reconstructible by an outside source." *Id.* The Memorandum then goes on to list *twenty-three* different types of data that were missing and should be supplied. EPA Review Memorandum, at 5.

With regard to the organic data, the EPA Review Memorandum acknowledges yet additional data gaps, including missing "Traffic Report"/Chain of Custody Documentation; Data Reporting Forms; data on quantitation of Aroclor peaks; data concerning specific peaks used to determine Aroclor Calibration Factors; the number and retention time of peaks quantitated in samples; and raw data (listing *twenty-five* different types of missing information). *See* EPA Review Memorandum, at 6.

It is not known whether EPA believes that the data submitted along with the EPA Review Memorandum fill the information gaps that EPA now acknowledges to have been present all along. Monsanto and Solutia note, however, among other problems, that certain of the required information are still missing, including chromatographs for the PCB Aroclors. In addition, several "SQLs" (sample quantitation limits) for metals noted as issues in the previous comments still cannot be confirmed with the information included in the new EPA data. There may be other omissions and problems with these new data, but EPA's failure to explain its understanding of their significance has made it impossible for Monsanto and Solutia to provide meaningful comments at the present time. Monsanto and Solutia therefore respectfully reserve the right to submit further comments on these data.

It is also Monsanto's and Solutia's understanding from the EPA Review Memorandum that EPA plans to supplement the record further with regard to the "second tier" issues (issues that "reflect[] specific technical criticism with the use of particular soil and sediment samples . . . used to verify the chemical composition of the Sauget Sites") and "third tier" issues (issues concerning data usability) and that the additional data submitted up to the present time do not address either of these types of issues. Therefore, Monsanto and Solutia respectfully reserve the right to comment on all tiers of data issues at such time as the remaining issues are addressed.

Docket Coordinator
United States Environmental Protection Agency
April 7, 1999
Page 4

Finally, Monsanto and Solutia note that EPA's failure to provide the necessary data along with the initial listing package has prejudiced and continues to prejudice Monsanto and Solutia by requiring the expenditure of additional resources for commenting and responding to data gaps that, in the eyes of EPA's own reviewers, were transparent and serious. EPA's failure to include these data initially render the Sauget listing proposal arbitrary and capricious and an abuse of discretion.

For all of the reasons specified above and in the Monsanto Comments, the listing of Sauget Area 1 on the NPL would be arbitrary and capricious and an abuse of discretion. Monsanto and Solutia therefore request that EPA not finalize the NPL proposal of Sauget Area 1 and that EPA remove Sauget Area 1 from the list of proposed NPL sites and from any further consideration for listing

Sincerely,

A handwritten signature in black ink, appearing to read "James W. Moorman". The signature is fluid and cursive, with the first name "James" being the most prominent part.

James W. Moorman
Laurence S. Kirsch
Jonathan R. Stone
Counsel to Monsanto Company and Solutia Inc.